

Our Lady of Lourdes Health Center and United Staff Nurses Union, Local 141, chartered by United Food and Commercial Workers International Union, AFL-CIO. Case 19-CA-21056

February 18, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On September 18, 1991, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Our Lady of Lourdes Health Center, Pasco, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted only to the judge's characterization of Pat Lacey's July 16, 1990 memorandum and to the judge's conclusion concerning the Respondent's contention that economic exigencies required instituting the new staffing schedule. The Respondent did not except to the judge's findings with respect to the Respondent's contractual defense.

In light of the judge's finding that 2 months elapsed between the Union's initial request to bargain over the issue of shift changes and the Respondent's unilateral implementation of new shift schedules, we find no merit in the Respondent's proffered defense of economic exigencies. Accordingly, we find it unnecessary to rely on the judge's characterization, JD at fn. 6, of Lacey's memorandum.

² In the remedy section of his decision, the judge inadvertently omitted reference to certain standards for the make-whole order here. Therefore, we modify that portion of his remedy as follows:

The amounts by which employees are to be made whole for lost wages shall be calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970). In addition, the Respondent shall make its employees whole for any losses resulting from the Respondent's failure to make contractual welfare and pension fund payments in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn.2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). As set forth by the judge, the interest on any money due and owing employees shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The method of determining the additional amounts, if any, owed to benefit funds is specified in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Joan R. Abbey, Esq., for the General Counsel.
William W. Treverton, Esq., of Seattle, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. I heard this matter on June 6, 1991, in Kennewick, Washington.

The complaint arose from a charge filed by United Staff Nurses Union, Local 141, chartered by United Food and Commercial Workers International Union, AFL-CIO (Union).¹ It alleges that Our Lady of Lourdes Health Center (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) on about July 3, 1990, by announcing and on about September 24, 1990, by instituting schedule changes for represented emergency room employees without giving the Union an opportunity to negotiate.

I. JURISDICTION/LABOR ORGANIZATION

Respondent operates an acute care hospital in Pasco, Washington. The complaint alleges, the answer admits, and I find that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act, and a health care institution within Section 2(14).

The pleadings also establish, and I find, that the Union is a labor organization within Section 2(5) of the Act.

II. THE ALLEGED MISCONDUCT

A. Evidence

The Union was certified on May 16, 1990, to represent Respondent's nurses.² It displaced another labor organization, the Washington State Nurses Association (WSNA). The events in question preceded the onset of contract negotiations between Respondent and the Union.³

On April 13, 1990, Respondent's director of ambulatory services, Pat Lacey, presided over a meeting of the Emergency Department staff. About seven unit employees attended. In that meeting, extracting from the minutes, Lacey raised "the possible need to go to 10 or 12 hour shifts and/or combination of shifts in order to adequately staff the department." The minutes indicate that Lacey "requested that a task force come together for input, suggestions and to provide samples of schedules," and that one of the employees, Joan Funderberk "volunteered to head up task force."

None of the shifts then exceeded 8 hours.

At a succeeding staff meeting, on June 29, Lacey presented a "sample schedule," which included 12-hour shifts. On June 30, Diane Dewar and Dana Crutchfield, emergency department nurses who doubled as local cochairpersons for the Union, submitted a letter to Lacey which stated in part:

¹ The charge was filed on August 13, 1990. The complaint issued on October 17.

² The formal unit description is: "All nurses classified as resident nurse, general duty staff nurse, and per diem nurse employed by Respondent at its facility at 520 North Fourth, Pasco, Washington; excluding confidential employees, guards, supervisors as defined in the Act, and all other employees." I find this to be an appropriate unit for purposes of the Act.

³ Negotiations began on October 16, 1990. The parties executed a contract on March 30, 1991, to be effective from that date through January 31, 1994.

We are opposed to any mandatory changing of shifts. New shifts (or "hours") might be offered to interested staff members (on a seniority basis).

We refer to 9.6 in the current contract which clearly states "Alternative work schedules may be established by the employer with the consent of the nurse(s) involved and prior notification to the union." Also 9.7.1 which states, "Established schedules may be amended by mutual agreement." And lastly, 9.7.2 as follows "There shall be no rotation of shifts without the consent of the individual nurse involved."

Prior to any further more formal communication, we would like to schedule a meeting with you.

The "current contract" to which Dewar and Crutchfield referred was that between Respondent and WSNA, which expired by its terms on June 30, 1990. Section 9.6 of that contract stated in part:

Alternative work schedules may be established by the Employer with the consent of the nurse(s) involved and prior notification to the Association.

Section 9.7 contained this clause: "The Employer retains the right to adjust work schedules to maintain an efficient and orderly operation." Sections 9.7.1 and 9.7.2 included the language set forth in the Dewar-Crutchfield letter.

An addendum to the WSNA contract stated in part:

In accordance with Section 9.6 of the Agreement . . . nurses may on an individual basis agree to work a twelve (12) hour shift schedule with the consent of the Employer.

Lacey responded to the Dewar-Crutchfield letter by two memoranda dated July 3. One, directed to Dewar and Crutchfield, thanked them for their "input," stated Lacey's assumption that they "were speaking for all ED staff in [their] role as [union] representatives," and said she would "gladly meet with" them. The other, directed to the Emergency Department staff, stated in part:

Obviously, there must be some confusion as to where we are with the development of 12 or 10 hour scheduling in the ED. I received a letter from your [union] representatives, Dana and Diane, informing me that prior to any further "formal communication," that I needed to meet with them.

. . . After developing many different schedules utilizing 8, 10, 12 and short shifts, a sample schedule was presented on June 29th that gives us excellent coverage . . . I do support such a schedule and will be presenting a proposal to administration the first of the week. If my proposal is accepted, we will then begin to work through the process of implementing. I am well aware of contractual articles related to alternative scheduling and certainly will follow these.

I would like to emphasize that we have a staffing crisis in the ED. . . . If it is deemed necessary that in order to provide adequate staffing coverage to ensure patient care and safety, that all ED shifts must be changed, we will do this. I will make every attempt to satisfy each

of your requests and will listen to your concerns and suggestions over the next week. I encourage each of you to meet with me if you have input, suggestions or concerns.

Dewar and Crutchfield met with Lacey the next week. They argued from the WSNA contract much as they had done in their June 30 letter, they declared that the contemplated changes were "not desired by all staff members," and they stated that they "would like the 12-hour shifts to be negotiated" in the pending contract negotiations. Lacey replied: "We will not negotiate 12-hour shifts."

With that, Dewar testified, she "realized that things had gone beyond what [she] was going to be able to solve at [her] level," and she reported the situation to a staff official of the Union.

The Union's president, Mary Batt, thereupon wrote Thomas Corley, Respondent's administrator. The letter, dated July 12, stated:

We have recently become aware of proposals at Our Lady of Lourdes to make unilateral scheduling changes affecting staff nurses.

By this letter, USNU 141 is notifying you that no changes in working conditions can be made without good faith bargaining with the Union. We demand that you bargain with us regarding any such changes covering mandatory subjects of bargaining. In the event you intend to consider planning any such changes, please notify USNU in sufficient time for us to arrange with you to meet and bargain.

Respondent apparently ignored this letter. On July 16, however, Lacey submitted a memorandum to Marilyn Hogrefe, Respondent's assistant administrator of nursing services, in which she stated variously that the emergency department had "a staffing crisis," that "the situation has reached a crisis as of this schedule," that the "nursing shortage" had been exacerbated by "an increase in numbers of patients and severity of illnesses and injuries over a period of years and especially over the last few months," that she had been "very uncomfortable with staffing levels and qualified staff for quite some time," that she had "requested additional staffing in the 1989/90 and 1990/91 budgets," that "physicians and staff alike are complaining and feeling more and more stress related to the above situation," that Respondent was "in a very precarious situation which must be dealt with immediately," that it "must attract quality emergency nurses," and that "12 hour shifts . . . will assist us in recruiting some experienced ED nurses that may be working [elsewhere] in 12 hour positions."

On August 7, Lacey announced during an Emergency Department staff meeting that a new schedule had been perfected and would go into effect September 11. She distributed this memorandum at the time:

We have been given approval by Administration to go forward with the changes described herein. . . . I realize that these changes may not be preferred by some of you and I will work very hard to place everyone in their shift of choice. All current staff have first priority to fill the available shifts and selection will be determined according to department seniority.

The shifts will be as follows:

Shift	Hours of Work	
8 hours	Days: 9 am to 5:30 pm	Eves: 5:50 pm to 2 am
12 hours	7 am to 7 pm	7 pm to 7 am
6 hours	5:30 am to 11:30 pm	

Please indicate your preference and return the form . . . by Monday, August 13 deadline. I will contact all staff individually by August 17 to discuss requests for the hours as listed on the form.

The 12 hour shifts will be implemented with the consent of the nurses who sign up and their hours of work will be paid according to the terms of the 12 hour addendum contained in the WSNA Agreement.⁴

On August 10, Dewar and Crutchfield again met with Lacey. They repeated the points they had made previously, and Lacey persisted that Respondent was "not going to negotiate 12-hour shifts."

By facsimile transmission dated August 10, an attorney for the Union, Nalani Askov, sent a copy of Lacey's August 7 memorandum to David Gravrock, Respondent's labor-relations consultant, and advised:

The matters which are the subject of this memorandum are mandatory subjects of bargaining. . . . Local 141 demands that the Employer bargain with the Union prior to implementing the shift schedule changes set forth in the memo. The Union is willing to meet with the Employer on an expedited basis for purposes of bargaining on this issue.

Refusal to bargain about mandatory subjects of bargaining is an unfair labor practice. In addition, implementation of the shift changes without bargaining is an unlawful unilateral change in terms and conditions of nursing staff employment. The Employer's requirement that nursing staff complete the shift preference form and its plan to meet individually and collectively with bargaining unit members to negotiate about the shift change is unlawful direct dealing. We request that the Employer cease and desist in these violations, restore the status quo ante and bargain with the Union prior to implementing any scheduling changes.

If we do not receive notice by 3:00 p.m., August 10, 1990, that the Employer agrees to bargain with the Union prior to implementation of the shift changes, an unfair labor practice complaint will be filed with the National Labor Relations Board.

Respondent did not respond; and, as earlier noted, the Union filed the present charge on August 13.

By letter to the Union dated August 27, Respondent's human resources director, Judy Williams, stated:

Please be advised that Our Lady of Lourdes Health Center will be instituting 12-hour shifts in the Emergency Department which will be posted August 31 to become effective September 10, 1990. The 12-hour

shifts will be assigned to nurses who have consented and prior notification is hereby being given to Local 141. This action is in accordance with Article 9, Section 9.6 and 9.7 entitled "Alternative Work Schedule" and "Work Schedules" in the existing WSNA contract.

Hours worked on the 12-hour shift schedule will be paid according to the provisions contained in the WSNA Contract Addendum entitled "Alternative 12-hour Shift Schedule."

The Union's Batt replied by letter dated September 5, "protest[ing] . . . unilateral action and direct dealing . . . as announced in" Williams' letter. Batt's letter added:

You assert in your letter . . . that the Hospital is privileged by its contract with [WSNA] to act unilaterally and deal directly with employees on scheduling matters. However, that contract is no longer in effect and WSNA is no longer the bargaining representative of your staff nurses. Any waiver by WSNA of its right and duty to represent nurses at the hospital for the purposes of collective bargaining is not binding upon USNU, Local 141. USNU Local 141 is the certified bargaining representative, not WSNA.

Accordingly, please contact me immediately to discuss the Hospital's decision to change the scheduling practices in the emergency room and the effects of that decision on bargaining unit employees. No change may be made without exhausting your duty to bargain.

Again, Respondent did not reply. It instead instituted the changes as announced.

B. Conclusion

The matter of work schedules is a mandatory subject of bargaining. E.g., *Water's Edge*, 293 NLRB 465 (1989). And, quoting from *Frankline, Inc.*, 287 NLRB 263, 264 (1987):

An employer whose employees are represented by a labor organization generally may not make unilateral changes with respect to mandatory subjects of bargaining.

Or, as stated in *Associated Services for the Blind*, 299 NLRB 1150 (1990):

[A]n employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment without first providing the collective-bargaining representative with a meaningful opportunity to bargain about the change.

Respondent did not give the Union a meaningful opportunity to bargain before deciding on and effecting the changes in question. It contends, however, that they were contemplated by the quoted provisions of the expired WSNA contract, and so were permissible. Unilateral changes in this context are not improper if "a mere continuation of the status quo." *NLRB v. Katz*, 369 U.S. 737, 746 (1962); *Garment Workers Local 512 v. NLRB*, 512 F.2d 705, 711 (9th Cir. 1986). Indeed, extracting from 299 *Lincoln Street*, 292 NLRB 172 (1988), "an employer is . . . obliged, on the union's demonstration of its majority in the election, to maintain in effect its current [terms and conditions of em-

⁴ The form mentioned in the memorandum was a questionnaire on which the nurses were to indicate their preferences among an assortment of proposed 8-, 10-, and 12-hour shifts.

ployment] until negotiations resulted in an agreement on [their] change or an impasse.”⁵

Whether a change is a permissible continuation of the status quo turns on the degree of discretion involved. Thus, in *NLRB v. Katz*, supra, at 369 U.S. 746, the Supreme Court concluded that certain so-called merit raises were unlawful because they were not “automatic raises to which the employer had already committed himself . . . but were informed by a large measure of discretion.” The Court added, at 746–747:

There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.

Similarly, in *Garment Workers Local 512 v. NLRB*, supra, at 795 F.2d 711, the Ninth Circuit rejected an employer’s contention that certain layoffs were lawful because in accordance with established policy. The court noted that economic layoffs “would seem to be inherently discretionary” and that “the long-standing practice exception suggested in *Katz* placed a heavy burden on the employer to show an absence of employer discretion in determining the size or nature of a unilateral employment change.”

To like effect, the Board in *McClatchy Newspapers*, 299 NLRB 1045 (1990), found improper an employer’s postimpasse institution of a merit-pay system in ostensible implementation of proposal that it have “unlimited management discretion” over the timing and amount of merit raises. The Board stated at 1046–1047 that, while the employer properly could insist to impasse on that proposal and properly could consider employees for merit increases after impasse, “it still had a duty to bargain with the Union about the timing and amounts . . . prior to granting any such increases.” See also *Logemann Bros. Co.*, 298 NLRB 1018 (1990); *Peelle Co.*, 289 NLRB 113 (1988).

Nothing in the contract language on which Respondent relies committed it to make the scheduling changes at issue, nor did that language spell out the details of any change that might be made. Quite obviously, then, the changes entailed the exercise of considerable discretion. That is evident not only from the leanness of the subject language, but from the meetings and memoranda that preceded effectuation. It is evident, as well, from the black-letter certainty that Respondent would not be found in violation of Section 8(a)(5) had it not made the changes, should the contention be made that it thereby had failed to maintain extant terms and conditions.

I conclude, therefore, that the changes entailed a degree of discretion well beyond that of continuing the status quo, and that Respondent consequently violated Section 8(a)(5) by deciding on and instituting them without inviting the Union’s participation.⁶

⁵ Terms and conditions of employment embodied in a labor agreement become, on the agreement’s expiration, “existing practices that an employer may not, under Section 8(a)(5) of the Act, change unilaterally.” *American Commercial Lines*, 291 NLRB 1066, 1075 (1988).

⁶ I reject Respondent’s contention that its straitened circumstances licensed unilateral action in any event. While the Board in *Bottom Line Enterprises*, 302 NLRB 373 (1991), acknowledges a “limited”

CONCLUSION OF LAW

Respondent violated Section 8(a)(5) and (1) of the Act on and after about July 3, 1990, by announcing and on about September 10, 1990, by instituting schedule changes for Emergency Department employees without giving the Union an opportunity to negotiate the matter.

REMEDY

I will include in my recommended Order provisions that Respondent cease and desist from the unfair labor practices found herein, and that it take certain affirmative action to effectuate the policies of the Act.

With regard to the latter, I will specify that Respondent rescind the unlawful changes if the Union so requests; and, should rescission occur, that it make all employees whole, with interest, in the event they incurred any loss of income or benefits as a result of the changes. Interest shall be calculated in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Our Lady of Lourdes Health Center, Pasco, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with United Staff Nurses Union, Local 141, chartered by United Food and Commercial Workers International Union, AFL–CIO as the exclusive collective-bargaining agent of the employees in the appropriate unit described below, by announcing and instituting schedule changes affecting certain of those employees without first satisfying its duty to bargain with Local 141 as required by the Act. The unit is:

All nurses classified as resident nurse, general duty staff nurse, and per diem nurse employed by Respondent at its facility at 520 North Fourth, Pasco, Washington; excluding confidential employees, guards, supervisors as defined in the Act, and all other employees.

exception “when economic exigencies compel prompt action,” Respondent plainly has not met the heavy burden required by that exception. In this regard, I discount Lacey’s July 16 memorandum to Marilyn Hogrefe, with its apocalyptic imaginings absent prompt action, as probably a self-serving counter to the Union’s July 12 letter asserting its right to bargain over the changes.

Respondent does not advance a waiver argument. I conclude, regardless, that nothing in the expired WSNA contract could constitute a waiver binding on the Union, and that the Union, by its conduct, did not waive its right to bargain over the changes. “The Board requires that a waiver of bargaining rights under Section 8(a)(5) not be lightly inferred, but must be clear and unmistakable.” *Colorado Ute Electric Assn.* 295 NLRB 607 (1989).

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the Union's request, rescind the changes in schedule unlawfully instituted for emergency department employees on about September 10, 1990; and, should rescission occur, make all employees whole, with interest as prescribed in the remedy section of this decision, in the event they incurred any loss of income or benefits as a result of the changes.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary or helpful to determine if and how much backpay is owing under the terms of this Order.

(c) Post at its facility in Pasco, Washington, copies of the attached notice, marked "Appendix."⁸ Copies of the Notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees customarily are posted. Respondent shall take reasonable steps to ensure that the notice is not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to bargain in good faith with United Staff Nurses Union, Local 141, chartered by United Food and Commercial Workers International Union, AFL-CIO, as the exclusive collective-bargaining agent of the employees in the appropriate unit described below, by announcing and instituting schedule changes affecting certain of those employees without first satisfying our duty to bargain with Local 141 as required by the Act. The unit is:

All nurses classified as resident nurse, general duty staff nurse, and per diem nurse employed by us at our facility at 520 North Fourth, Pasco, Washington; excluding confidential employees, guards, supervisors as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights protected by the Act.

WE WILL, on the Union's request, rescind the changes in schedule unlawfully instituted for Emergency Department employees on about September 10, 1990; and, should rescission occur, WE WILL make all our employees whole, with interest, in the event they incurred any loss of income or benefits as a result of the changes.

OUR LADY OF LOURDES HEALTH CENTER